Supreme Court, U. S.
FILED
AUG 1 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-186

ALFRED A. PORRO, Jr.,

Petitioner,

vs.

JOSEPH C. WOODCOCK, Jr., Bergen County Prosecutor; JAMES MAYER, Bergen County Assistant Prosecutor; BERGEN COUNTY PROSECUTOR'S OFFICE; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1973; GRAND JURY SECOND STATED SESSION, SEPTEMBER TERM 1974; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1974, and GRAND JURY, UNKNOWN STATED SESSION OR TERM 1975,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

October Term, 1977
No.

ALFRED A. PORRO, Jr.,

Petitioner,

vs.

JOSEPH C. WOODCOCK, Jr., Bergen County Prosecutor; JAMES MAYER, Bergen County Assistant Prosecutor; BERGEN COUNTY PROSECUTOR'S OFFICE; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1973; GRAND JURY SECOND STATED SESSION, SEPTEMBER TERM 1974; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1974, and GRAND JURY, UNKNOWN STATED SESSION OR TERM 1975,

Respondents.

The petitioner seeks reversal of a judgment of the Supreme Court of New Jersey dismissing an appeal of the Lower Court's ruling dismissing the Complaint for failure to state a cause of action.

THE OPINIONS BELOW

This case is a civil action for violation of Constitutional rights of the plaintiff by the defendant prosecutional officials during the conducting of a grand jury investigation. The Trial Court, The Superior Court of New Jersey, Law

Division, Bergen County, rendered an oral Opinion on October 28, 1975 dismissing the Complaint on the defendants' motion to dismiss for failure to state a cause of action. This Opinion is not officially reported, but a transcript of the same is appended to this Petition as Appendix "A." On February 25, 1977, the Superior Court of New Jersey, Appellate Division, Docket No. A-1024-75, held "that the Court below did not err in granting the motion to dismiss." Likewise, this opinion is not officially reported but a copy of the per curiam Opinion is attached hereto as Appendix "B." On May 3, 1977, the Supreme Court of New Jersey Docket No. A-1024-75, dismissed the appeal. No reason was expressed, nor is this decision officially reported. A copy of the Order of dismissal is annexed hereto as Appendix "C."

JURISDICTIONAL STATEMENT

(i) The judgment sought to be reviewed is the ruling of the Supreme Court of New Jersey of May 3, 1977 which affirmed the judgment of the Superior Court of New Jersey, Appellate Division entered on February 25, 1977, which in turn affirmed the judgment of the trial court entered on November 19, 1975.

(ii) No Petition for Rehearing was filed, nor was any request granting an extension of time within which to Petition for Certiorari.

(iii) Jurisdiction of this Petition for Certiorari is conferred on this court by Title 28 of the United States Code, section 1257 (3), 28 U.S.C. 1257 (3) and jurisdiction is further conferred upon this court by Title 42 of the United States Code, section 1983, 42 U.S.C. 1983.

QUESTIONS PRESENTED FOR REVIEW

1. Does Title 42 of the United States Code, Section 1983, 42 U.S.C. 1983 provide relief from the deprivation of substantial rights, privileges, or immunities secured by the Constitution committed by state prosecutors during the course of a grand jury investigation.

2. Do the actions of the prosecutors, including the failure to inform the petitioner that he had been indicted and concealing said indictment from him while compelling him to testify before the indicting grand jury, constitute a violation of the United States Constitution, Amendments Five and Six.

3. Does the New Jersey Supreme Court decision barring civil relief from investigative stage prosecutional action decide a federal question of substance in a way probably not in accord with applicable decisions of this Court as in *Imbler v. Pachtman*, 424 U.S. 40 (1976) and *Helstoski v. Goldstein*, U.S. Court of Appeals for the Third Circuit, Docket No. 76-956 presently before this court, October, 1976 term, Docket No. A1062.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the United States Constitution:

> 1. Amendment V—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of

life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Constitution, Amendment 5.

2. Amendment VI—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his deference. U.S. Constitution, Amendment 6.

3. Amendment XIV—Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the priviliges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Constitution, Amendment 14.

The following Federal statutory provision is involved in this case:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 42 U.S.C. Section 1983.

STATEMENT OF THE CASE

The defendants commenced an investigation approximately three years ago of the plaintiff. This investigation extended over the term of four Grand Juries.

A Verified Complaint was filed against the defendants on September 30, 1975, setting forth numerous actions which violated substantial Constitutional rights of the plaintiff, including the Fifth, Sixth and Fourteenth Amendments; also alleged was the violation of 42 U.S.C. Section 1983. These violations consisted of illegal electronic taping of defense conversations in the law office of the plaintiff relative to defense witnesses, documents and strategy on no less than 15 occasions between June 1975 and October 1975; utilization of unauthorized subpoenas to obtain numerous records of plaintiff and invasion of plaintiff's personal and professional records; numerous Grand Jury leaks to the press; intimidation and harassment of witnesses and extensive Grand Jury abuses.

These violations also encompass the concealment of the indictment of the plaintiff while requiring him to testify extensively regarding the subject matter thereof.

Immediately after the service of the aforementioned Civil Complaint it was dismissed by the trial court by granting a motion to dismiss for failure to state a cause of action (Appendix A). This dismissal was affirmed by the Appellate Division (Appendix B) and the Supreme Court of New Jetrsey (Appendix C). The Federal questions of the violation of the constitutional rights in question and the availability of a civil remedy relative to the same were timely and properly raised so as to give this Court jurisdiction to review the State Court Judgments on Writ of Ceritorari.

All of these Constitutional violations and Federal issues were raised by way of the aforementioned civil complaint and subsequent briefs and oral arguments. In spite of the common law and the statutory provision of 42 U.S.C. Section 1983, which were raised by the Complaint and in written and oral argument before the Trial and Appellate Court and in written argument presented to the Supreme Court of New Jersey, this Complaint was dismissed for failure to allege a cause of action. None of said Courts would address these Constitutional and Federal questions.

ARGUMENT

I. Clarification of *Imbler v. Pachtman* to avoid existing conflicting Federal and State court opinions.

Since the decision of this Court in *Imbler v. Pachtman, supra,* which held that Prosecutors were absolutely immune from civil damage suits, including suits brought under 42 U.S.C. 1983, while performing quasi judicial functions in certain circumstances, a substantial degree of conflict has occurred in both the Federal and State Courts respecting the unresolved issue of lack of absolute immunity in the Prosecutor's role as an "investigative officer rather than an advocate." *Id.* 430-431. In a similar case, presently before this Court, *Helstoski v. Goldstein,* the United States Court of Appeals for the Third Circuit on March 28, 1977 held that prosecutorial activities, similar to the ones in the case at Bar, consisting of Constitutional violations in an investigative role "would lie outside the rationale for absolute immunity set forth in *Imbler.* At most, it would be subject to a qualified good faith immunity." However, in this very same circuit the New Jersey State Courts held, as in the case at Bar, that no cause of action exists.

Thus, the case at Bar, together with the *Helstoski* case presently before the Court, presents the issue which this Court did not address in the *Imbler* case. In that case this Court said:

> "We have no occasion to consider whether like or similar reasons requires immunity for those aspects of the Prosecutor's responsibility that cast him in the role of an administrator or investigative officer, rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the Prosecutor is immune from a civil suit for damages under Section 1983." Id. at 430-431.

Also see the post *Imbler* cases of *Halperin v. Kissinger*, U.S. District Court for the District of Columbia, Docket No. 1187-73, decided December 8, 1976, wherein the Court, comparing the *Imbler* case, held that investigative electronic techniques which violated Constitutional rights did not warrant prosecutional immunity. Also see *Tomko v. Lees*, 416 F. Supp. 1137, 1138 (D. Pa. 1976), holding that *Imbler* does not bar civil action against a prosecuting attorney for Constitutional violations in an investigative stage of the case. Also see *Brower v. Horowitz*, 535 F.2d 830 (3rd Cir. 1976) holding that *Imbler* granted prosecutor immunity where he allegedly conspired with a witness to knowingly use false and perjured testimony in that it was not investigative activity. Also *Hedeleone v. Thomas*, 423 F. Supp. 7 (D. Neb. 1976) where the Court after granting absolute immunity to a sheriff, stated that although prosecutors enjoyed absolute immunity when they exercise judicial or quasi-judicial discretion, other State officers did not unless they acted in good faith. Also see report of Comptroller General of the United States, *Law Suits Against the Government Relating to a Bill to Amend the Privacy Act of 1974*, May 6, 1977.

Thus, it appears that the case at Bar, together with the pending *Helstoski* case, should be decided to clarify the unresolved issue in the *Imbler*, whether prosecutorial immunity extends to investigative activities as well as advocacy or quasi judicial functions.

II. The U.S. Supreme Court should decide whether 42 U.S.C. Section 1983 actions are available to persons deprived of their civil rights during a Grand Jury investigation.

The case at bar demonstrates the necessity to provide an effective Civil remedy to prevent extensive and continuing constitutional violations at the grand jury investigative

stage. Without such a remedy all of the substantial Constitutional violations complained of are implicitly sanctioned. It should be noted that although recognizing all of the actions in question as being unconstitutional, the New Jersey Courts have declared that said actions are not of the nature to justify the dismissal of an indictment. *State v. Porro*, N.J. State Indictment S-1320-75. The intervening indictment did not render the case moot. *National Land and Investment Co. v. Specter*, 428 F.2d 91 (1970). As Chief Justice Richard Hughes of the New Jersey Supreme Court made clear in condemning such grand jury leaks:

> "Danger is being done every day to the reputation of citizens presumed by every constitutional intendent at that stage to be innocent and innocent until convicted, and this kind of damage, of course, is irreversible." 97 NJ L.J. 110 (June 6, 1974) Also see Fahringer, Herald Price, the *Problem of Grand Jury Leaks, Trial*, A.T.L.A. 33 at 37 (May, 1976).

Similarly the prevention of the intrusion into the defense camp by illegal electronic surveillance is only effectively enjoined by such civil actions, particularly where the same is done intentionally. *Bursey v. Weatherford*, 45 L.W. 4154 (1977); Also see *Halperin v. Kissinger, supra; Wright v. State of Florida*, 49 F.2d 1086 (5th Cir. 1974); also see *Roach v. Harper*, 105 S.E. 2d 564 (W. Va. 1956); *Billings v. Atkinson*, 489 S.W. 2d 858 (Tex. 1973) and *Zweibson v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975); *Abramsen v. Mitchell*, 459 F.2d 955 (8th Cir. 1972); *also see Roach.*

The intrusion into the defense camp, in this matter, violates substantial constitutional rights. *United States v. Rispo*, 460 F.2d 965 (3rd Cir. 1972); *Caldwell v. United States*, 205 F.2d 879 (D.C. Cir. 1953), *cert. den.* 349 U.S. 930, *reh. den.* 349 U.S. 969 (1955); *Coplan v. United*

States, 191 F.2d 749 (D.C. Cir. Ct. 1950). It is particularly noted that the prosecution, even through a third party, cannot "with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations and to participate in their counsels of defense," *State v. Cory*, 62 Wash. 2d 371, 392 P.2d 1019, 5 A.L.R. 3d 1352 (1963). "What was learned by the agents would be of help to them in structuring an answer to the affirmative defense they anticipated and knowledge on the part of the agents of defense plans and strategy is all I think is necessary to require dismissal." *United States v. Orman*, 417 Fed. Supp. 1126 at 1136 (D.C. Colo. 1976). This is exactly what occurred in the case at bar. A simple remedy is essential.

Likewise, the extensive practice of the abuse of the grand jury subpoena power by prosecutors issuing unauthorized subpoenas, while the grand jury is not in session, "for the purpose of conducting his own inquisition is clearly unconstitutional but left without the availability of a civil action." *Durbin v. United States*, 221 F.2d 520 (D.C. Cir. 1954), *United States v. Miller*, 500 F.2d 771 (1974).

Most shocking is the prosecutional investigative practice of indicting a defendant, bringing him before a grand jury, concealing the indictment, and misrepresenting to him that he is a "target" and not a defendant. Thereafter proceeding to take extensive testimony relative to the subject matter of the indictment. The New Jersey court has deemed such a practice as shocking but an insufficient basis to discharge an indictment. The Sixth Circuit has compared this practice to the "Star Chamber of the Eighteenth Century, an institution which helped produce the American Revolution." It stated that " • • • the proceeding is an abuse of the process and violates both the Sixth and the due process clause of the Fifth Amendment."

United States v. Doss, U.S. Court of Appeals 6th Cir., and decided on December, 1976. The cumulative actions of the prosecutors' offices in abusing the grand jury process constitutes a clear violation of the due process right to a fair and impartial grand jury proceeding. *Beck v. Washington*, 369 U.S. 541, 8 L.Ed. 2d 98, 82 S. Ct. 955, *reh. den.* 370 U.S. 965, 8 L.Ed. 2d 834, 82 S. Ct. 1572 (1962). In the case at Bar, a defendant is left without any effective remedy, if complaints, primarily for injunctive relief can be systematically dismissed on an alleged failure to state a cause of action. The position of the New Jersey State Courts in this case demonstrate the complete immunity of State Prosecutor's from civil action. Thus, without clarification of the status of civil remedies respecting unconstitutional investigative actions of prosecutors a substantial miscarriage of justice is occurring. Without such a remedial avenue there is no effective sanction of these extensive and growing investigative improper and unconstitutional actions.

APPENDIX "A"

ORDER AND OPINION, NEW JERSEY SUPREME COURT, LAW DIVISION

(Filed November 19, 1975)

This matter having been heard by the Court on the return day of an order directing defendants Woodcock, et al., to show cause why the relief sought by Plaintiff in his complaint should not be granted, and the State having moved to dismiss the complaint for failure to state a claim upon which relief can be granted, and the Court having considered the affidavits and briefs filed on behalf of the respective parties, and the Court having heard and considered the arguments of counsel, and it appearing to the Court that the State of New Jersey is entitled to the relief requested, and the Court having rendered an oral opinion setting forth findings of fact and conclusions of law which are hereby incorporated by reference, and good cause appearing;

Now therefore, on this 19th day of November, 1975,

IT IS ORDERED that Count One of the Complaint be dismissed for failure to state a claim upon which relief can be granted, without prejudice to the right of the Plaintiff to pursue his appropriate legal remedies at the appropriate time; and

IT IS FURTHER ORDERED that Count Two of the Complaint be dismissed for failure to state a claim upon which relief can be granted, and for the fact that Count Two alleges no interference with the legal rights of the named Plaintiff, without prejudice to the right of the Plaintiff or Ann Gibson to pursue the appropriate legal remedies at the appropriate time.

/s/ Theodore W. Trautwein
THEODORE TRAUTWEIN, J.S.C.

A copy of this order to be served on
adversary's attorney within 5 days

OPINION OF
THEODORE W. TRAUTWEIN, AJSC.

This Court having considered the briefs and affidavits submitted by respective Counsel and having heard all arguments relative to this matter on the 9th of October 1975, concludes as follows:

The first issue to be decided today is whether the first count of the verified complaint must be dismissed for failure to state a claim upon which relief may be granted. The Court concludes that said count must be dismissed without prejudice to the right of plaintiff to raise the same issues at a later date in the event an indictment should issue against him. Plaintiff requests this Court to grant injunctive relief by issuance of a writ of prohibition. The grant of a writ of prohibition lies within the sound discretion of the Court to be exercised with great caution and forebearance, according to the circumstances of the particular case and only where the right to such relief is clear. 73 Corpus Juris Secundum Section 5. A writ of prohibition ordinarily will not be granted if there are other remedies at law which would afford complete and adequate relief.

The guidelines to be followed by the Court in determining whether or not interlocutory injunctive relief should issue have been well documented in the *Citizens Coach Company vs. Camden Horse Railroad Company*, 29 New Jersey Equity 299 (Court of Error and Appeals 1878). Therein at page 303, *et seq.* the Chief Justice of the Court of Errors and Appeals postulated the following three legal rules to guide our Courts in weighing the propriety of injunctive relief;

1. A preliminary injunction will never be ordered unless from the pressure of an urgent necessity. The damage

threatened to be done, and which it is legitimate to prevent, must be, in an equitable point of view, of an irreparable character.

2. A complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled.

3. If the facts constituting the complaint of the complainant for the immediate interposition of the Court are controverted under oath by the defendant, the Court will not interfere at the initial stage of the cause.

In the instant case plaintiff alleges that he has suffered and will continue to suffer irreparable harm personally and professionally if the investigation is not halted at this juncture. Grand Juries have traditionally been afforded great latitude in the scope of their investigations. Inquiries directed at public bodies, such as the East Rutherford Sewerage Authority, are clearly matters of public import related to the public welfare and of ultimate benefit to the community served by the Grand Jury. The tangential public embarrassment and humiliation of an individual doing business with a public body under investigation does not rise to that level of irreparability of harm sufficient to invoke the injunctive power of this Court. Moreover, the legal right on which plaintiff grounds his claim is, as a matter of law, unsettled. The Court, after diligent inquiry, is unaware of any case in which a Grand Jury investigation was halted at the pre-indictment phase and any "planned" indictment enjoined. The plaintiff herein has adequate remedies at law in the event an indictment should issue against him. Plaintiff may move to quash the indictment, sue for actual and punitive damages for illegal wiretapping pursuant to N.J.S.A. 2A:156A-24, or bring a suit sounding in tort against the above named defendants. Moreover, if the

pre-trial publicity in the instant matter has so permeated the community so as to prejudice plaintiff's right to a fair trial, plaintiff may move for a change of venue or alternatively, may request that individual jurors so prejudiced be excused on *voir dire*. Therefore, this Court concludes that the issuance of injunctive relief at this stage of the proceedings would constitute an infringement of the legal rules postulated by the Court of Errors and Appeals in *Citizens Coach Company vs. Camden Horse Railroad Company* and, moreover, would result in a serious invasion of the secrecy of Grand Jury proceedings.

The rationale of this Court is equally applicable to the second count of the verified complaint insofar as the relief requested in the first count of the complaint. However, the Court will take this opportunity to comment on plaintiff's request that further harassment of Ann Gibson be enjoined and that the Grand Jury be discharged relative to the alleged invalid investigation of Ann Gibson. It is axiomatic that an injunction will not be granted to restrain acts that occasion no injury to the complainant. The basis for injunctive relief must be interference with a legal right of the plaintiff, not of a third party. The complainant, Alfred Porro herein, cannot succeed because Ann Gibson may be injured. 42 Am Jur Second, Section 29, page 765. Therefore, the second count of the verified complaint is similarly dismissed without prejudice to the right of plaintiff or Ann Gibson from pursuing their legal and equitable remedies in the event an indictment should issue against either or both of them.

At this time the Court refrains from addressing the merits of the motions brought by Ann Gibson returnable October 31, 1975, to wit: The challenge to the array of Grand Jurors relative to all the defendants Grand Juries, the motion to have all pleadings, documents, and proceedings impounded, sealed and heard *in camera*, the demand for a bill of particulars, the request to interview Grand Jurors, the motion to dismiss the indictment, the motion to suppress illegally obtained evidence, and finally the request for discovery, other than to make a few observations in a few minutes about State vs. Gibson.

The order to show cause is, therefore, discharged, dismissed, and the complaint dismissed without prejudice. Submit order in accordance with this decision. You may incorporate the Court's findings by reference as set forth in its oral opinion either under the five day rule, or with the consent attached.

Now, it should be noted that there have been no answering affidavits filed in this matter by the Prosecutor's Office for obvious reasons. This would destroy the secrecy of the Grand Jury proceedings which at least until today in this matter are still inviolate, but the Court must make this observation that merely from oral argument, when it was heard *in camera* on October 9, there were certain statements made by the Assistant Prosecutor, who argued this cause, that demonstrated to the Court that there could have been substantial fact conflicts developed in this case, which is simply another reason under the *Camden Coach* case why preliminary or interlocutory injunctive relief should not be granted.

Now, with respect to *State vs. Gibzson*, there are motions returnable on Friday October 31. I will set them down for two o'clock. However, I would like to hear from both the Prosecutor and Mr. Porro as to why this matter as far as *State vs. Gibson* should continue *in camera*. I believe it is in that posture now—maybe I should hear Mr. Porro first.

MR. PORRO: Your Honor, I would like to request that your Honor postpone those motions and I think that

will avoid the necessity of it being *in camera*, namely it appears as if the Prosecutor's Office is going to move relative to myself before this week is out, or the early part of next week, in which event—

THE COURT: What does that mean "move?"

MR. PORRO: Well, according to what they said in open Court they said they . . .

APPENDIX "B"

OPINION
NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

Argued February 9, 1977; Decided February 25, 1977.

Before Judges Lora, Crane and Michels.

On appeal from Superior Court, Law Division, Bergen County.

Mr. Alfred A. Porro, Jr., argued pro se.

Mr. Marcel R. Plaut, Deputy Attorney General, argued on behalf of respondents (Mr. William F. Hyland, Attorney General, attorney).

PER CURIAM

The plaintiff Alfred A. Porro, Jr. brought an action in the Law Division alleging that the defendant prosecutor and assistant prosecutor were conducting a Grand Jury investigation of his business and professional affairs in a manner which infringed upon his constitutional rights. The essential relief sought in the complaint was the injunction of the return of an indictment against him; the delivery to him of all Grand Jury minutes, statements, testimony and records; the injunction of further harassment; the disqualification of the prosecutor and his staff from any further investigation of the plaintiff; the appointment of an independent counsel to review the actions of the prosecutor and the discharge of the Grand Jury.

On motion of the defendant prosecutor, the court below dismissed plaintiff's complaint on the ground that irreparable harm was not shown and that plaintiff could move for relief in the criminal proceedings if an indictment

were to be returned. Subsequently the Grand Jury did return an indictment against the plaintiff. He appeals.

The return of the indictment against the plaintiff has rendered substantially all of the issues raised by plaintiff moot. *Alboum v. City of Newark*, 22 *N.J.* 571 (1956). Nevertheless, since it is theoretically possible to grant some of the relief sought by plaintiff in this complaint, we have considered the appeal on its merits. See *National Land & Investment Company v. Specter*, 428 *F.* 2d 91, 94 (3 Cir. 1970).

Our careful review of the record persuades us that the court below did not err in granting the motion to dismiss. The judgment is affirmed for the reasons expressed in the oral opinion of Judge Trautwein delivered on October 28, 1975. See *Eleuteri v. Richman*, 47 *N.J. Super.* 1, 26 (App. Div. 1957), aff'd. 26 *N.J.* 506 (1958), *cert.* den. 358 *U.S.* 843 (1958); *Moresh v. O'Regan*, 122 *N.J. Eq.* 388 (E. & A. 1937); 4 *Pomeroy, Equity Jurisprudence* (5th Ed. 1941) §1361(b) at 978.

A TRUE COPY

Elizabeth McLaughlin
Clerk

APPENDIX "C"
NEW JERSEY SUPREME COURT ORDER
(Filed May 3, 1977)

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss appeal is granted.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 3rd day of May, 1977.

/s/ Florence R. Peshoe
FLORENCE R. PESHOE
Clerk

A TRUE COPY
Florence R. Peshoe
Clerk

Supreme Court, U. S.
FILED
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Respondents.

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Verified Complaint 1a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-186

ALFRED A. PORRO, JR.,

Petitioner,

vs.

JOSEPH C. WOODCOCK, JR., Bergen County Prosecutor; JAMES MAYER, Bergen County Assistant Prosecutor; BERGEN COUNTY PROSECUTOR'S OFFICE; GRAND JURY, THIRD STATED SESSION SEPTEMBER TERM 1973; GRAND JURY SECOND STATED SESSION, SEPTEMBER TERM 1974; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1974, and GRAND JURY, UNKNOWN STATED SESSION OR TERM 1975,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

New Jersey Statutory Provisions and Court Rules Cited

New Jersey Court Rule

3:10-2. Defenses and Objections Which Must Be Raised Before Trial

The defense of double jeopardy and all other defenses and objections based on defects in the institution of the

prosecution or in the indictment or accusation, except as otherwise provided by R. 3:10-3 (defenses which may be raised only before or after trial) and R. 3:10-4 (lack of jurisdiction), must be raised by motion before trial. Failure to so present any such defense constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver.

New Jersey Statutes Annotated

2A:156A-21. Motion to suppress contents of intercepted communication or derivative evidence; grounds; appeal

Any aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State may move to suppress the contents of any intercepted wire or oral communication, evidence derived therefrom, on the grounds that:

a. The communication was unlawfully intercepted;

b. The order of authorization is insufficient of its face;

c. The interception was not made in conformity with the order of authorization or in accordance with the requirements of [law].

The motion shall be made at least 10 days before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the moving party was not aware of the grounds for the motion. The court, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interests of justice. If the motion is granted, the entire contents of all intercepted wire or oral communications obtained during or after an interception which is determined to be in violation of this act under subsections a., b., or c. above, or evidence derived therefrom, shall not be received in evidence in the trial, hearing or proceeding.

In addition to any other right to appeal, the State shall have the right to appeal from an order granting a motion to suppress if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within the time specified by the Rules of Court and shall be diligently prosecuted.

2A:156A-24. Civil action for unlawful interception, disclosure or use of wire or oral communication; damages; attorneys' fees

Any person whose wire or oral communication is intercepted, disclosed or used in violation of this act shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication; and shall be entitled to recover from any such person:

a. Actual damages, but not less than liquidated damages computed at the rate of $100.00 a day for each day of violation, or $1,000.00, whichever is higher;

b. Punitive damages; and

c. A reasonable attorney's fee and other litigation costs reasonably incurred.

Statement of the Case

Sometime in the spring of 1974, respondents commenced an investigation of the East Rutherford, New Jersey, Sewerage Authority as well as persons and business enterprises associated therewith. A newspaper article, which appeared in a local newspaper on May 17, 1974, disclosed that records of the Authority had been subpoenaed by respondents who were investigating possible conflicts of interest.

Thereafter, grand jury subpoenas were issued to secure petitioner's billing records for legal services rendered to the East Rutherford Sewerage Authority and the Borough of East Rutherford as well as documents and materials relating to petitioner's association with a bond underwriting corporation, Municipals, Inc., and a real estate consultant firm to the Authority, Arrow Realty. (Petitioner's cousin, Ms. Anne Gibson, was a representative of the latter company during this period). Many of these materials were taken without formal notice to petitioner.

On September 16, 1975, petitioner commenced a civil action, by verified complaint against respondents, charging them with pursuing an unlawful investigation of petitioner which was calculated to obtain his indictment.* Specifically, petitioner alleged that respondents acted in an unfair and partial manner by distorting or twisting facts which were disclosed through the investigation and considering matters outside the reasonable scope of any probable criminal action. Petitioner also asserted that respondents Joseph Woodcock, the Prosecutor of Bergen County, James Mayer, then an Assistant Prosecutor, and the Bergen County Prosecutor's Office improperly convened the respondent Grand Juries for particularized im-

* Petitioner's complaint is appended hereto.

proper purposes, exercised undue influence and control over their operation, abused the subpoena power of respondent Grand Juries for particularized improper purposes, exercised undue influence and control over their operation, abused the subpoena power of respondent Grand Juries and prevented petitioner from presenting evidence during the Grand Jury investigation. Respondents Woodcock, Mayer and the prosecutor's office were further accused of violating Grand Jury secrecy, unlawfully copying personal and business records for improper purposes, illegal wiretapping and conflict of interest.

The relief requested by petitioner was fivefold in nature: (1) injunctive; (2) disqualification of the prosecuting defendants and discharge of respondent Grand Juries; (3) protective discovery; (4) removal of all wiretapping equipment from the telephone and other facilities of petitioner; (5) the appointment of an independent counsel to review petitioner's activities. No money damages were ever sought. Accompanying the verified complaint was an order to show cause filed in the Superior Court of New Jersey, Law Division embodying interim or permanent restraint and such other intermediate or permanent relief as sought in the complaint. The order to show cause was made returnable on October 9, 1975.

On September 30, 1975, respondents filed a notice of motion, returnable October 9, 1975, for an order dismissing the complaint for failure to state a claim upon which relief could be granted or, in the alternative, for summary judgment. The alternative motion for summary judgment was withdrawn by respondents, without prejudice, on October 2, 1975.

On the return date of the order to show cause and respondents' motion, the trial judge reserved decision. Thereafter, on October 28, 1975, the trial court discharged the order to show cause and dismissed the complaint, for

failure to state a cause of action upon which relief could be granted, without prejudice to the right of petitioner to raise the aforementioned issues subsequent to the issuance of any indictment.

In dismissing the complaint, the trial court focused upon the great latitude traditionally accorded grand juries in pursuing their investigations. Since the inquiry was directed toward a governmental body, a public interest attached. The court then noted that petitioner's attempt to enjoin pre-indictment grand jury proceedings was apparently without precedent in New Jersey law. The "tangential public embarrassment" suffered by one doing business with a public body under investigation was insufficient "irreparable harm" to warrant injunctive relief. Moreover, the requested forms of relief would have resulted in a serious invasion of the secrecy which surrounds grand jury proceedings. Finally, it was observed that petitioner had many adequate remedies at law in the event an indictment issued against him.

The second count of the complaint was dismissed for the additional reason that the legal rights of a third party were raised therein. In its conclusion, the court also remarked that the prior hearing on the parties' respective motions had demonstrated that substantial fact conflicts could develop in the case. On October 30, 1976, petitioner was indicted by a Bergen County Grand Jury for conspiracy, misconduct in office, and bribery. As yet, these charges have not been tried.

An Order dismissing the complaint was entered on November 19, 1975. A Notice of Appeal to the Superior Court of New Jersey, Appellate Division was timely filed on December 2, 1975. Subsequent thereto, respondents moved to dismiss the appeal for want of appellate jurisdiction. The motion was denied on April 1, 1976, by the Honorable John F. Lynch, P.J.A.D. for the court.

On February 25, 1977, the Superior Court of New Jersey, Appellate Division, rendered an unpublished decision affirming the trial court's order. The court observed that the return of the indictment mooted most of the issues, but passed nevertheless on the merits and affirmed for the reasons cited in the trial court's opinion. Thereafter, petitioner filed a Notice of Appeal in the New Jersey Supreme Court. Respondents moved to dismiss the appeal. On May 3, 1977, the New Jersey Supreme Court granted the motion. This Petition for Writ of Certiorari followed.

REASONS FOR DENYING CERTIORARI

POINT I

Petitioner's claims are not justiciable, since they raise purely hypothetical questions within the context of this case, and since they have been rendered moot by the return of an indictment.

Petitioner's application is divided into two separate points which appear to present several reasons for granting certiorari. Respondents submit that petitioner presents no justiciable claims, since virtually none of his arguments were presented to the New Jersey courts. Further, petitioner lacks standing since the arguments presented in his petition have been rendered moot by virtue of the return of the indictment. Consequently, petitioner's present application is without merit. Respondents will answer in this single point.

The first point raised by petitioner in support of the writ is a contention that this Court should clarify its decision in *Imbler* v. *Pachtman,* 424 U.S. 409 (1976). Briefly, this Court there held that State prosecutors sued

in actions for money damages under 42 U.S.C. §1983 were immune from liability for acts "in initiating a prosecution and in presenting the State's case, . . ." 424 U.S. at 430-31. Petitioner, however, never sought money damages from respondents. His suit was solely for injunctive relief. *Imbler* v. *Pachtman* is totally immaterial, for it does not affect the relief petitioner sought. Therefore, petitioner was not harmed in the legal sense by any application of that case's derivative doctrine. And, finally, neither the trial nor the appellate court applied the doctrine of prosecutorial immunity in dismissing petitioner's civil action. Hence, petitioner is without standing to advance the instant claim before this Court. *E.g., Flast* v. *Cohen,* 372 U.S. 83 (1968). The question raised is purely hypothetical. *E.g., Muskrat* v. *United States,* 219 U.S. 346 (1911).

Petitioner's second point in support of his petition consists of several distinct contentions presented under a caption which urges the Court to determine whether 42 U.S.C. §1983 is available as a remedy at the grand jury stage. Petitioner apparently claims that it is necessary for the Court to determine the extent of equitable relief available under 42 U.S.C. §1983 to individuals who are damaged by prosecutorial investigative abuses. He contends that 42 U.S.C. §1983 should be interpreted to permit issuance of equitable relief to dismiss indictments, to prevent grand jury "leaks," to enjoin improper issuance of subpoenas, and to require notification that an individual is a "defendant" rather than a target. Respondents submit that none of these contentions are justiciable.

The extent of equitable relief under 42 U.S.C. §1983 available to individuals involved in the criminal process has been discussed in a long line of decisions by this Court. *E.g., Kugler* v. *Helfant,* 421 U.S. 117 (1975);

Gerstein v. *Pugh,* 420 U.S. 103 (1975); *Steffel* v. *Thompson,* 415 U.S. 542 (1974); *Mitchum* v. *Foster,* 407 U.S. 225 (1972); *Dyson* v. *Stein,* 401 U.S. 200 (1971); *Perez* v. *Ledesma,* 410 U.S. 82 (1971); *Younger* v. *Harris,* 401 U.S. 37 (1971); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *Douglas* v. *City of Jeanette,* 319 U.S. 360 (1943); *Fenner* v. *Boykin,* 271 U.S. 240 (1926); *Ex Parte Young,* 209 U.S. 123 (1912). See generally, *e.g., Colorado River Water Conservation District* v. *United States,* 424 U.S. 800 (1976). While these decisions involved "abstention" doctrines in the context of federal civil rights jurisdiction via 28 U.S.C. §1343 (3), they uniformly recognize as applicable several ancient equitable principles. Among these principles are the indisputably valid mandates that equity will not enjoin criminal prosecutions and that equity will not intervene where a litigant has adequate remedies at law. Of course, exceptions to even these rules do exist, but these qualifications have been thoroughly discussed by this Court. See, *e.g., Younger* v. *Harris, supra; Colorado Water Conservation District, supra.* There are no important questions to be determined in the context of the instant matter.

Furthermore, aside from the well-developed issues of civil rights equity law which petitioner would claim to be unsettled, it is clear that the claims in his second point are as non-justiciable as those raised in the first point. Petitioner complains that 42 U.S.C. §1983 should permit dismissal of indictments for prosecutorial misconduct (Pb9). However, he never sought that relief in this action. In short, petitioner sought to enjoin indictment and never amended his complaint to encompass his present claim. As with his first point, he lacks standing and presents a hypothetical question. Further, he has an adequate remedy at law, since New Jersey provides defendant

with a motion dismiss an indictment on grounds of prosecutorial or grand jury misconduct. New Jersey Court Rule 3:10-2. See, *e.g., State* v. *Ferrante,* 111 N.J. Super. 299, 168 A.2d 301 (App.Div. 1970). Since the issue was never raised before in the instant terms and since petitioner does have an adequate remedy at law, certiorari is wholly unnecessary.

Petitioner also contends that some form of equitable relief is necessary to stop grand jury "leaks," within the context of 42 U.S.C. §1983. As with the other contentions, it does not appear that this was raised before. Likewise, New Jersey law recognizes an action in damages for official misconduct. See *Cashen* v. *Spann,* 66 N.J. 541, 334 A.2d 8 (1975). Injunctive relief is also available. No reason for the grant of certiorari is present therefor.

Petitioner next speaks of illegal wiretapping intrusion by the respondents into the "defense camp" and the need to utilize 42 U.S.C. §1983 as a means of barring such invasions. At the time petitioner's complaint was filed, no indictment had been returned. There was no "defense camp". Nevertheless, the New Jersey Electronics Surveillance Act provides strict controls over the use of wiretapping, and gives petitioner the means by which he can attack any irregularities or invasions of his rights. N.J. Stat. Ann. §§2A:156A-21, 24 (1971). See, *e.g., State* v. *Muldowney,* 60 N.J. 594, 292 A. 2d 26 (1972). Once more, the question presented is hypothetical and remedies at law are adequate. See also *Cashen* v. *Spann, supra.*

Petitioner next claims that this Court should provide a means to enjoin abuse by prosecutors' "illegal" subpoenas (Pb10). But, petitioner complied with the subpoenas. It would appear that he therefore waived his rights and is estopped from asserting them. *Cf. Blackledge* v. *Perry,* 417 U.S. 21 (1973). In any case, New

Jersey law permits subpoenas to be quashed for illegality or abuses. See, *e.g., In re Addonizio,* 53 N.J. 107, 248 A. 2d 531 (1968). Therefore, petitioner presents a hypothetical question for which the pragmatic answer must simply be that he has an adequate remedy at law.

Lastly, petitioner contends that he was called before a grand jury and advised that he was a "target" rather than a "defendant". Once more, there is no allegation concerning such activity in petitioner's complaint. The question is most surely not now justiciable. Regardless, as to "target" or "defendant" status, petitioner would raise a mere semantic distinction to constitutional level. See *State* v. *Sarcone,* 96 N.J. Super. 501, 233 A. 2d 406 (Law Div. 1967).

Moreover, return of the indictment has rendered moot all the issues advanced. From a federal constitutional perspective, mootness raises a jurisdictional question. *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971); *Leonhart* v. *McCormick,* 395 F.Supp. 1073, 1078 (W.D.Pa. 1975). Impotence to review cases which exhibit this fatal infirmity derives from the requirement of Article III of the Constitution that the exercise of judicial power be dependent upon the existence of a "case or controversy". U.S. Const. Art. III, §2; See *DeFunis* v. *Odegaard,* 416 U.S. 312, 316 (1974); *Powell* v. *McCormack,* 395 U.S. 486, 496 n.7 (1969); *Liner* v. *Jafco, Inc.,* 375 U.S. 301, 306 n.3 (1964). See generally Diamond, "Federal Jurisdiction to Decide Moot Cases," 94 U.Pa.L.Rev. 125 (1964); Note, "Mootness on Appeal in the Supreme Court," 83 Harv.L.Rev. 1672 (1970). To be cognizable, a suit must be definite, concrete and pose a real and substantial controversy. See *Golden* v. *Zwickler,* 394 U.S. 103, 108 (1969); *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240-241 (1937).

The return of an indictment by the Grand Jury has nullified any compulsion for the various forms of relief

sought by the plaintiff. He now possesses the right to discovery of the Grand Jury testimony, statements and various other materials previously requested. New Jersey Court Rules 3:13-3, 3:17-1. See also *United States* v. *Romenesko,* 398 F.Supp. 416 (E.D.Wis. 1975), where a motion for discovery and inspection, made subsequent to the indictment of defendants, was denied as moot because defendants had been permitted to examine the Government's file. As to the remaining forms of relief sought by petitioner, the proper remedy to be pursued at this juncture would be a motion to dismiss the indictment for prosecutorial misconduct.

Nevertheless, the doctrine of mootness does not preclude judicial consideration of a case where there is a reasonable expectation that the wrong will be repeated. See *Sec. & Exch. Comm'n* v. *Medical Comm. For Human Rights,* 404 U.S. 403 (1972); *United States* v. *W.T. Grant Co.,* 345 U.S. 629 (1953). Consequently, the short-term nature of an action will not necessarily expose it to dismissal by operation of the mootness doctrine where the issues presented are "capable of repetition, yet [evade] review". *Southern Pac. Terminal Co.* v. *ICC,* 219 U.S. 498, 515 (1911). See *Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976); *Weinstein* v. *Bradford,* 423 U.S. 147 (1975); *Super Tire Eng'r Co.* v. *McCorkle,* 416 U.S. 115 (1974).

With the indictment of plaintiff, it is self-evident that the grievances herein presented, even if true, are not capable of repetition. The matter is now an academic one. Any wire tapping activity in which respondents may have engaged has ceased. The Grand Jury which returned the indictment has been discharged and there are presently no additional targets of investigation in this matter. Consequently, there is nothing to enjoin and no one to discharge.

Hence, plaintiff is essentially seeking to utilize this Court as a vehicle to obtain judicial opinions upon points of law in the absence of a viable controversy. His supplications on appeal do not pose any exception to well established mootness principles and should not therefore encounter any success. And finally, petitioner may avail himself of adequate remedies at law which are available in New Jersey through the vehicle of a motion to dismiss an indictment.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the instant petition for writ of certiorari be denied.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondents
By: DAVID S. BAIME
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Deputy Attorney General
Division of Criminal Justice
On the Brief

APPENDIX

Verified Complaint

(Filed—September 16, 1975)

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—BERGEN COUNTY

DOCKET NO.

CIVIL ACTION

ALFRED A. PORRO, JR.,

Plaintiff,

—VS.—

JOSEPH C. WOODCOCK, JR., Bergen County Prosecutor; JAMES MAYER, Bergen County Assistant Prosecutor; BERGEN COUNTY PROSECUTOR'S OFFICE; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1973; GRAND JURY, SECOND STATED SESSION, SEPTEMBER TERM 1974; GRAND JURY, THIRD STATED SESSION, SEPTEMBER TERM 1974; and GRAND JURY, UNKNOWN STATED SESSION OR TERM 1975,

Defendants.

Plaintiff, Alfred A. Porro, Jr., by way of complaint against the defendants, says:

FIRST COUNT

1. Plaintiff is an Attorney-at-Law of the State of New Jersey, specializing in the field of public law, more particularly tidelands and riparian law and laws affecting public projects, representing the East Rutherford Sewerage Authority and many other authorities throughout the State of New Jersey, representing the Borough of East Rutherford and many other municipalities throughout the State of New Jersey in various capacities and representing many political and public officials. He also enjoys a reputation as a known author and lecturer on the subject matters in question. Plaintiff has established a good reputation for integrity and competence in discharging his legal duties.

2. The defendant Joseph C. Woodcock, Jr., is the Prosecutor of Bergen County, a law enforcement officer for the State of New Jersey, pursuant to N.J.S.A. 2A:158-1 et seq., James Mayer is an Assistant Prosecutor of Bergen County, a law enforcement official, pursuant to N.J. S.A. 2A:158-15 et seq., The Bergen County Prosecutor's office is a law enforcement office for the State of New Jersey, consisting of said Prosecutor, Assistant Prosecutors, Detectives and Investigators, pursuant to N.J.S.A. 2A:157-1 et seq. and N.J.S.A. 2A:158-1 et seq. All of said defendants are charged with the responsibility of enforcing the law through means that are uniform, fair, impartial, ethical and legal and are to refrain from any improper methods calculated to produce a wrongful indictment in violation of any rights of any citizen.

3. The four Grand Jury defendants, namely Grand Jury Third State Session, September Term 1973; Grand Jury, Second Stated Session, September Term 1974;

Grand Jury, Third Stated Session, September Term 1974 and a certain Grand Jury, unknown Stated Session or Term, 1975, were all allegedly convened and allegedly bestowed jurisdiction with reference to the subject matters hereinafter set forth. All of said Grand Jury defendants were bestowed with the responsibility of protecting the rights of citizens, including the plaintiff, relative to any alleged acts of criminal wrong doing.

4. On and before the 16th day of May, 1974, a certain newspaper, having an extensive showing of hostility toward the plaintiff, did publish a series of articles alleging wrong doings of the plaintiff and various members and representatives of the East Rutherford Sewerage Authority.

5. In response to and in conjunction with said newspaper, on or about the 17th day of May, 1974, the defendants, Joseph C. Woodcock, Jr., Prosecutor of Bergen County; James Mayer, Assistant Prosecutor of Bergen County; the Bergen County Prosecutor's Office and allegedly the Grand Jury, Third Stated Session, September Term 1973 and thereafter, the other defendants did declare the plaintiff to be a "target" of an investigation and did in fact conclude that their purpose and mission was to indict said plaintiff for any facts which it might disclose, create, distort or twist into alleged wrong doing. With this mission determined, said Office did from that date to the present pursue an unlawful investigation of said plaintiff, with a purely deductive approach, calculated to obtain the result desired. Said investigation included extensive matters outside of the scope or jurisdiction of any of the defendants and outside of any reasonable scope of probable criminal action. Said inves-

tigation included (a) the amounts of bills paid to said plaintiff for legal services rendered to the East Rutherford Sewerage Authority and the Borough of East Rutherford for a period covering 1968 to date; (b) the plaintiff's relationship with the former bond underwriting firm, Municiplex, Inc., a public company; (c) plaintiff's alleged relationship with a real estate consultant firm to the East Rutherford Sewerage Authority, Arrow Realty; and (d) other miscellaneous matters evolving around the plaintiff's professional and personal life. Said investigation has been and continues to be tained with self and adverse interests, personal, political and other reasons of the said defendants, preventing fair and impartial conduct, constituting a serious conflict of interest of said offices and institutions.

6. In spite of repeated requests by the plaintiff to the said defendants, throughout the aforementioned time period, for said plaintiff to be allowed to meet, cooperate with and to present fair and impartial evidence to the aforementioned defendants, said Prosecutor, Assistant Prosecutor and Bergen County Prosecutor's Office have absolutely refused and have prevented said plaintiff from doing the same.

7. As a matter of law, the amount of legal fees charged and paid for legal services rendered to the aforementioned public bodies is outside the scope and jurisdiction of any of the said defendants; as a matter of law, there is no criminal conflict of interest resulting from the fact that the plaintiff, in years past, did represent as an attorney and consultant and on occasion was an officer and stockholder of Municiplex, Inc., a public company specializing in public authority bond underwritings for major public

projects. It is immaterial that said company was retained as an independent contractor, underwriter and investment banker for the East Rutherford Sewerage Authority and other sewerage authorities throughout the State of New Jersey. It is immaterial that said company did in fact structure and participate in the successful underwritings jointly with two other bond firms for the East Rutherford Sewerage Authority and pursuant to the agreement with said Sewerage Authority was in fact compensated by way of a portion of the bond discount for all services rendered in that regard. Plaintiff, on all occasions, did fully disclose to said Sewerage Authority and all of its members his relationship with said bond company and did in fact disqualify himself from representing either the Sewerage Authority or Municiplex, Inc., as their relationship pertained to one another. Further, as a matter of law, no criminal cause resulted from the fact that the plaintiff is related to one, Anne Gibson, a representative of Arrow Realty, which firm had been retained by the East Rutherford Sewerage Authority, after taking proposals for the purpose of collecting data, retaining experts and doing all necessary to evaluate the losses incurred by the East Rutherford Sewerage Authority as a result of the location of the New Jersey Sports and Exposition Authority in said municipality.

8. In the course of pursuing its purpose and motive to indict and smear said plaintiff, the defendants, Woodcock, Mayer and the Bergen County Prosecutor's Office, through various representatives thereof, and the defendants, Grand Jury Third Stated Session, September Term 1973; Grand Jury, Second Stated Session, September Term 1974, Grand Jury, Third Stated Session, Septem-

ber Term 1974 and Grand Jury, unknown Stated Session and Term, 1975, have greatly abused the functions and responsibilities of their various offices and positions and have greatly injured and damaged the plaintiff, violating very substantial rights of said plaintiff and have greatly smeared and injured his reputation and do intend to continue and by such have and will continue to inflict irreparable harm and injury upon said plaintiff.

9. *Grand Jury Abuse*: The defendants, Woodcock, Mayer and various representatives of the Bergen County Prosecutor's Office, have greatly abused the function and institution of the four Grand Juries named above, and have utilized them as an instrument to obtain its predetermined self-interest purpose of a smearing indictment and have completely abandoned the true function of said Grand Juries as a shield for an individual from unjustified or political prosecutions. Among, but not limiting, the abuses utilized in the present situation are the following:

A. *Abuse of Grand Jury's Subpoena Power*: Issuance of various false, unauthorized and illegal grand jury subpoenas of the four Grand Juries named above for the purpose of obtaining records, creating an air of threat and for the purpose of utilizing said Grand Juries as an instrument of harrassment and speculative discovery, when in fact said Grand Juries were not convened relative to the matters in question nor did they have any jurisdiction regarding the same. In the alternative, if in fact any of said Grand Juries were convened relative to such matter, the convening of the same and issuance of subpoenas therefor were illegal and under circumstances rendering any action thereof void. Defendants have further

greatly abused the subpoena power of the alleged Grand Juries by utilizing the same as a discovery device, a burdensome device, a device violating the right against self-incrimination and the attorney-client privilege.

B. Allegedly and improperly convening said Grand Juries for the following improper purposes:

(i) *Selective Prosecution*: Selecting the plaintiff particularly with adverse and conflicting motives and interests, and discriminating against said plaintiff as a particular "target" without the uniform application of any recognized standards to others; applying an actual biased standard in the selection of the plaintiff as a "target" and abusing prosecutorial discretion in this regard.

(ii) *Speculative Investigation*: Commencing said investigation as a response to the aforementioned newspaper's desires without any reasonable basis for believing that it would uncover evidence of any specified crimes. Said defendants have utilized the alleged four Grand Juries' investigations as a blanket inquiry to bring to light supposed grievances or wrongs for the specific purpose of criticizing the plaintiff without knowledge gained from any trustworthy information that criminal conduct existed or at least one or more cognate offenses existed on which to base a general investigation. Said investigation was for purely speculative purposes and was and is in fact odious and oppressive. The alleged Grand Juries at no time knew what crimes, if any, they were to investigate. Said alleged Grand Jury investigations set forth, throughout the time periods involved, were fruitless

searches, founded upon mere rumor, suspicion and conjecture. Said speculative investigations involved the expenditure of a great amount of funds of the public to the great inconvenience of the plaintiff and seriously interfered with the normal functioning of the public officials and bodies brought before it. Said investigation has thrown a cloud of suspicion upon the plaintiff and the public bodies and officials in question and has seriously subjected them to attack and undermined the public confidence in them. Such a speculative investigation has and continues to greatly injure the reputation and rights of the plaintiff, the public bodies and officials involved and the public at large.

(iii) *Discovery*: The defendants, Woodcock, Mayer, and the Bergen County Prosecutor's Office have used the four alleged Grand Juries as a discovery device to help prepare for trial in a situation where an indictment has already been predetermined and further has illegally taped and recorded testimony of various witnesses for said purposes, without allowing said witnesses to actually appear before any of the Grand Juries in question. Said defendants have further used the subpoena power of the four Grand Juries in question for said illegal discovery purposes. Any alleged evidence received as a result thereof is illegal.

(iv) *Freezing of Testimony*: The said defendants have utilized the four Grand Juries for the purpose of "freezing" the testimony of hostile witnesses to the "target", the plaintiff.

(v) *Intimidation and Harrassment of Witnesses*: Said defendants have utilized the aura and power

of the alleged four Grand Juries to intimidate and harrass numerous witnesses, including but not limited to the following:

(a) Former underwriting officers and associates. Said defendants have utilized the aforementioned alleged Grand Juries to intimidate officials from underwriting firms that did business with Municiplex, Inc. and the East Rutherford Sewerage Authority alleging that they had committed criminal conduct by their actions in the underwritings for the East Rutherford Sewerage Authority, including Richard Tecott, former president of Tecott, Jackson Co., a joint underwriter with Municiplex, Inc., of the 1968 East Rutherford Sewerage Authority revenue bond issue; Timothy Sullivan, President of Gibraltar Securities Co., the underwriter of the 1971 East Rutherford Sewerage Authority revenue bond issue; and Fred Rosenberg and Walter Schulz, officers of Municiplex, Inc., and further threatening to take action against them to recover the bond discount charged pursuant to the power vested in said County Prosecutor under N.J.S.A. 40:14A-30. Said defendants did further intimidate and harrass said witnesses by either expressly or impliedly stating that unless said witnesses agreed to and did in fact testify to an alleged conflict of interest of the plaintiff and/or alleged payment of funds in consideration of said bond underwriting to officials that said witnesses would be prosecuted for criminal conduct and further, either expressly or impliedly offering immunity from said prosecution if said witnesses did in fact supply the testimony desired by the defendants.

(b) East Rutherford Sewerage Authority Commissioners and Public Officials. Said defendants did intimidate and harrass the former and present Commissioners of the East Rutherford Sewerage Authority and other officials of the Municipality, alleging that they had committed criminal conduct in their actions and on occasion threatened that they were in "deep trouble" and in a particular instance accused one of the members of being a "bag" man and a partner in Arrow Realty and further threatened that if he did not change his story he would be forced to testify before a Grand Jury and perjury charges would be brought against him. Said defendants ignored and attempted to eliminate the testimony of said Commissioners that the plaintiff had disqualified himself relative to any dealings between the public body and Municiplex, Inc., and the other underwriters and were highly critical of said officials when they stated that they were aware that Municiplex, Inc. was to be paid for its services by and through the joint underwriter and not by the Authority. Said defendants intimidated and harrassed said witnesses for not changing their testimony relative to the points propounded by the defendants. Said defendants refused to hear or take any testimony relative to the good interest rates obtained by the public body through the underwritings in question, any of their independent investigations or verifications of the same or the general good faith exercised by the plaintiff and said Commissioners. Said defendants also harrassed said Commissioners advising them that they were "used".

(c) Anne Gibson: Said defendants did intimidate and harrass Anne Gibson, a representative of Arrow Realty, alleging that she committed a criminal act relative to her services to the East Rutherford Sewerage Authority and further did threaten to commence criminal action against her and did in fact commence a criminal Grand Jury investigation against her relative to her receipt of certain welfare checks if she did not change her story regarding her services and relationship with the East Rutherford Sewerage Authority and the plaintiff. The defendants did further harrass Anne Gibson by threatening to have her real estate license taken away from her, harrassing telephone calls advising that she was being used and if she would change her story everything would be all right for her and the obvious taking pictures of her in public.

(d) Former Clients and Accounts: The defendants did harrass former legal clients of the plaintiff relative to the same.

(vi) Circumventing Fair and Impartial Hearings: The defendants have selected only such testimony as might have a damaging effect upon the plaintiff in furtherance of the purpose for which they convened the carious Grand Juries involved and have refused and have not in fact permitted any testimony or evidence before such Grand Juries which would be favorable to said plaintiff, constitute a defense to any of the alleged crimes or would in fact negate any crime whatsoever.

C. *Undue Influence and Control of Grand Juries*: The defendants have utilized the alleged Grand Juries with

undue influence and control establishing a clear blue-print to dictate the result of an indictment desired by said defendants against the plaintiff, including but not limited to the over-bearing presence of said defendants, statements of said defendants to the Grand Juries, questions, the presentation of selected proofs and the failure to present exculpatory evidence and the over-all actions and access of said defendants relative to the alleged Grand Juries.

D. *Violation of Grand Jury Secrecy*: Defendants have seriously violated the secrecy of the alleged Grand Juries by the "leaking" to the press of the actions of said Grand Juries and by the making of unlawful and unethical comments relative to the same; more particularly, on the 17th day of May 1974, at the very outset of the alleged probe, the said defendants did illegally and highly prejudicially comment in a certain article published in the aforementioned newspaper as follows:

> "The Bergen County Prosecutor's Office has subpoenaed records of the East Rutherford Sewerage Authority and is investigating the Agency for possible conflict of interest.
>
> 'It's improper, if not illegal', Prosecutor Joseph C. Woodcock, Jr., said, referring to a report—published yesterday in The Record—that few checks are made on how the Authority's Commissioners spent about $500,000 a year in public money.
>
> 'If they don't report to the Mayor and Council, then who checks them?' Woodcock asked."

Further, the said defendants have acted in conjunction with and cooperated with certain selected newspapers in pursuing the attempt to obtain an indictment against the

plaintiff, consummating, but not limited to an extensive feature article appearing in the Sunday Star Ledger, July 20, 1975, wherein said Bergen County Prosecutor's Office did disclose

> "that executives of at least two New Jersey bond houses have been interviewed by Woodcock's investigators in an effort to learn about the operation of Municiplex as well as to learn about the bond issues voted by the East Rutherford and Carlstadt Authorities and the Borough of East Rutherford",

and further said Prosecutor's Office did state to said newspaper and was quoted therein as follows:

> "One law enforcement official, revealing the operation of a Northern Jersey Sewerage Authority went so far as to say he suspected the Authority was established solely for the purpose of paying large fees to politically favored lawyers and other professionals—*'a public rip-off of the first order'*."

The statement further proceeded:

> "Allegations that portions of those fees were kicked back to the politicians who cleared the way for their appointments are under investigation by the official, who asked not to be named."

The article further proceeded:

> "• • • It has been learned that, among other things, the Grand Jury is probing the purchase by East Rutherford Sewerage Authority for $1 million a sewer pipe owned by the Borough, why the purchase was necessary and that price and its effects in terms

> of rates on home owners and industries using the Authority's services. • • • The investigation is also focusing, according to informed sources, on Porro's personal interest in a now defunct investment banking firm known as Municiplex, and its relationship to the East Rutherford Sewerage Authority."

All of the aforementioned actions of the defendants completely eliminated the existence of any protection whatsoever for the aforementioned "target", the plaintiff, and the general manipulation and multiplicity of said Grand Juries have resulted in a serious violation of the plaintiff's rights as hereinafter stated.

10. *Invasion of Records*: The defendants, under the guise of the alleged four Grand Juries have also unlawfully and illegally, without the permission, knowledge or consent of the plaintiff, made copies of personal and business records, checks and accounts of said plaintiff and have improperly and unlawfully utilized said copies, distorting and misrepresenting facts to others in an attempt to harrass said plaintiff and others to further the self-interest motivation in obtaining an indictment against the plaintiff.

11. *Illegal Wiretapping*: Upon information and belief, said defendants have also engaged in the unlawful and improper practice of utilization of such mechanical devices as wiretapping of the plaintiff's office, home and other phones and facilities in violation of State and Federal wiretapping laws.

12. *Conflict of Interest*: The actions of the defendants constitute a serious and substantial conflict of interest re-

sulting from (a) defendants' interest in obtaining a predetermined indictment to satisfy the aforementioned newspaper demand with a self and adverse interest, personal, political and other partial reasons, (b) violating the standards of due process and (c) the obligation to pursue restitution against one of the witnesses pursuant to N.J.S.A. 40:14A-30, which witness has been threatened and promised immunity.

13. *Causing Rumors of Indictment*: Defendants have recklessly and maliciously caused to be spread rumors of a forthcoming and imminent indictment of the plaintiff.

14. *Violation of Duty*: As a result of the aforementioned actions, the said defendants have jointly and severally seriously and substantially violated the duties and obligations vested in them as a result of (a) the violation of said Prosecutor and Prosecutor's Office and the alleged Grand Juries of their duty to seek justice and not merely to obtain indictments and a violation of all standards to obtain said result, further constituting a violation of a sound and impartial determination of guilt or innocence; (b) the improper use of the respective offices, positions and the alleged Grand Juries to violate the rights of the plaintiff in an effort to bring about an unjust and improper indictment; (c) a violation of said defendants' obligation to disqualify themselves relative to said investigation of the "target" as a result of the aforementioned conflict of interest with the fair, impartial and proper discharge of their respective duties.

15. *Denial of Rights*: The aforementioned actions of the defendants are so wanton, blatant and harrassing as to deny the plaintiff of his fundamental State and Federal

Constitutional and other rights, including but not limited to:

A. Right of due process of law, guaranteed under the Fifth and Fourteenth Amendments of the Constitution of the United States and of the New Jersey Constitution;

B. Prohibition against illegal searches and seizures protected under the Fourth Amendment of the Constitution of the United States;

C. Prohibition against personal rights protected under the Fifth Amendment of the Constitution of United States;

D. Right to a fair jury trial and fair procedural rights, including the right to a speedy and public trial of an impartial jury, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process of obtaining witnesses in his favor and to have assistance of counsel for his defense, all as protected under the Sixth Amendment of the Constitution of the United States;

E. Right of privacy and other rights protected under the Ninth and other Amendments of the Constitution of the United States;

F. Right of equal protection of the law as protected under the Fourteenth Amendment of the Constitution of the United States;

G. Rights under the New Jersey Court and other Rules as they relate to the functioning and privacy of Grand Jury hearings and other related matters;

H. Rights against the violation of various Federal and State Acts, including but not limited to 42 U.S.C. §1983, prohibiting the utilization of an official office to deprive the rights of persons; 42 U.S.C. §1985 prohibiting the conspiracy to interfere with the rights of another and prohibiting an official from performing duties;

I. Rights against violating the duties and responsibilities imposed upon said officials pursuant to N.J.S.A. 2A:158-1 et seq. and other pertinent laws, rules and regulations;

J. Rights against the violation of the obligation of the County Prosecutor's Office as provided for in N.J.S.A. 40:14A-30.

16. *Irreparable Harm*: As a result, plaintiff has and will continue to incur irreparable and substantial harm and further will be irreparably and substantially harmed in the event defendants are permitted to complete their plan to wrongly indict and smear plaintiff.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

1. Enjoining the issuance of the indictment planned, determined and informally announced by said defendants.

2. Ordering *in camera* the production of all of the alleged Grand Jury proceedings, minutes, alleged statements, testimony and records as the same may relate to the matter in question; and further all of the wiretapping tapes of the plaintiff and others and all of the statements and tapes of statements of others, including those favorable to the plaintiff and records and data collected by the defendants.

3. Enjoining any further harrassment and threats by said defendants to the plaintiff or others as they relate to the plaintiff.

4. Enjoining any further taking of photostats of the checks and/or records of the plaintiff and ordering the return of said existing photostats to said plaintiff.

5. The removal of all wire-tapping equipment from the telephone and other facilities of the plaintiff and an impounding of any and all tapes and information obtained from the same.

6. Ordering the disqualification of the defendant Prosecutor, Assistant Prosecutor and Bergen County Prosecutor's Office Staff relative to the said investigation.

7. Discharging the alleged Grand Juries relative to said investigation.

8. The appointment of an independent counsel to review and report to the Court impartially relative to the activities of said plaintiff, pursuant to the Court's direction.

SECOND COUNT

1. Plaintiff repeats each and every allegation of the First Count of the complaint and incorporates the same by reference herein as if the same had been set forth at length and makes the same a part hereof.

2. Throughout the aforementioned period the defendant James Mayer and various representatives of the defendant Bergen County Prosecutor's Office, did intimidate and

harrass Anne Gibson to the effect that if she did not change her story regarding her services and relationship with the East Rutherford Sewerage Authority and the plaintiff that there would be a reprisal against her relative to her present receipt of welfare funds.

3. As a result of the failure of Anne Gibson to submit to the intimidation and harrassment of said defendants, on or about August 19, 1975, she was notified by Bergen County Welfare Board, Edward Testa, Acting Director, by Leslie Baer, Caseworker, that she had ceased to be eligible for ADC assistance and by Ms. Rita Goldstein, Supervisor of Bergen County Food Stamp Program that her food stamp assistance would be terminated effective August 31, 1975, alleging "you have withheld information and your earned income exceeds your grant".

4. Further, on or about August 27, 1975, said defendants did cause to be commenced criminal investigation against said Anne Gibson with regard to said welfare allegations, under Case Number F-75-102 and did under the guise of a specific Grand Jury, the term and session of which is unknown, 1975, further the intimidation and harrassment of her. In fact, the true purpose of said investigation is to further the plan of said defendants to indict the plaintiff and to attempt to pressure said Anne Gibson to aid in that determination.

5. Under the guise of said defendant Grand Jury, the aforementioned defendants did issue and serve subpoenas *duces tecum* as follows:

(a) On or about August 22, 1975, to Alfred A. Porro, Jr., demanding the production of "All records

and checks of all and any disbursements, records of employment; records of payment of rent (716 Paterson Ave., E. Rutherford) pertaining to Ann Gibson" without limitation of time periods. Said service was defective and illegal and for the purpose of harrassment, having been left with an associate attorney at the office of Alfred A. Porro, Jr.

(b) On or about August 26, 1975, to J. P. Investments, Inc., a real estate holding company which the plaintiff's family owns, which is the owner of the office building at 10 Stuyvesant Avenue, Lyndhurst, N. J. for the production of "Any and all records and rental receipts pertaining to Arrow Realty from a period from 1968 through August 1975".

(c) On or about August 26, 1975, to Arrow Realty —Frank L. Savona or Ann Gibson demanding the production of "All and any business records pertaining to the business of Arrow Realty to include personnel records, all cancelled checks, cash receipt book, payroll records for the time period of Jan. 1, 1969 through August, 1975.

6. On or about September 4, 1975, plaintiff did appear in response to said subpoenas in spite of the defective service, in an effort to cooperate. Plaintiff did produce certain available records prior thereto by way of a letter dated September 3, 1975, did explain that the location and inspection of other records, extending beyond the two year statute of limitations relative to the alleged crimes involved, was overly burdensome, if not impossible.

7. At such time and place plaintiff was instructed to continue to search for and to produce such earlier records,

extending beyond the statutory limitation period and to return again before said Grand Jury on Thursday, September 11, 1975.

8. As a result of the aforementioned actions of the said defendants and the abuse of the use of said Grand Jury as a guise for an attempt to obtain said evidence, not otherwise obtainable against the plaintiff, in the plan to indict the plaintiff as set forth in the First Count of this complaint and the use of said Grand Jury to intimidate and harrass Anne Gibson regarding said plaintiff, said defendants have (a) violated the duties and responsibilities of their office as more particularly set forth in paragraph 14 of the First Count of the complaint and (b) violated the rights of the plaintiff as more particularly set forth in paragraph 15 of the First Count of the complaint.

9. As a result of the said actions, the plaintiff has and will continue to be irreparably and substantially harmed.

WHEREFORE, plaintiff demands judgment against said defendants as follows:

1. Enjoining said defendants from further harrassing and intimidating the plaintiff through the use of said Grand Jury against Anne Gibson.

2. Enjoining said defendants from demanding through subpoena or otherwise any further records beyond the two-year statute of limitations period as set forth above, and further enjoining the use of any evidence obtained in the aforementioned Grand Jury proceeding against the plaintiff.

Verified Complaint

3. Ordering *in camera* the production of all of the alleged Grand Jury proceedings, minutes, alleged statements, testimony and records as the same may relate to the matter in question.

4. Enjoining the further taking of photostats of any of the checks and/or records of the plaintiff and the said Anne Gibson beyond the aforementioned statute of limitation period and ordering the return of the existing photostats of the same.

5. Enjoining any further taking of photographs of the said Anne Gibson for the purpose of harrassment and intimidation against the plaintiff.

6. Ordering the disqualification of the defendants Prosecutor, Assistant Prosecutor and Bergen County Prosecutor's Office Staff relative to the said investigation.

7. Discharging the Grand Jury relative to the alleged invalid investigation of Anne Gibson.

8. The appointment of an independent counsel to review and report to the Court impartially relative to the activities of said plaintiff and Anne Gibson pursuant to the Court's direction.

s/ ALFRED A. PORRO, JR.
Alfred A. Porro, Jr., Pro Se

Verified Complaint

VERIFICATION

STATE OF NEW JERSEY, }
COUNTY OF BERGEN, } ss.:

I am the plaintiff in the foregoing complaint and am fully familiar with the allegations contained therein.

I state that the facts contained in the within complaint are true.

s/ ALFRED A. PORRO, JR.
Alfred A. Porro, Jr.

(Sworn to September 11, 1975.)